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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

IN RE: FACEBOOK, INC. CONSUMER )  
PRIVACY USER PROFILE LITIGATION. ) NO. 18-MD-2843 VC (JSC)  
San Francisco, California  
Monday, July 13, 2020

**TRANSCRIPT OF ZOOM VIDEOCONFERENCE PROCEEDINGS**

**APPEARANCES:**

For Plaintiffs:

BLEICHMAR FONTI & AULD LLP  
555 12th Street  
Suite 1600  
Oakland, California 94607  
**BY: LESLEY E. WEAVER, ESQ.**  
**ANNE K. DAVIS, ESQ.**  
**MATTHEW MONTGOMERY, ESQ.**

KELLER RORHBACK, LLP  
1201 Third Avenue  
Suite 3200  
Seattle, Washington 98101  
**BY: DEREK W. LOESER, ESQ.**  
**DAVID J. KO, ESQ.**  
**CARI C. LAUFENBERG, ESQ.**

GIRARD SHARP LLP  
601 California Street  
Suite 1400  
San Francisco, California 94108  
**BY: ANGELICA M. ORNELAS, ESQ.**

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**  
Official Reporter, U.S. District Court

(Appearances continued, next page)

**APPEARANCES, CONTINUED:**

For Defendants:

GIBSON DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, New York 10166  
**BY: ORIN SNYDER, ESQ.**

GIBSON DUNN & CRUTCHER LLP  
1881 Page Mill Road  
Palo Alto, California 94304  
**BY: MARTIE P. KUTSCHER CLARK, ESQ.**

GIBSON DUNN & CRUTCHER LLP  
2100 McKinney Avenue  
Suite 1100  
Dallas, Texas 75201  
**BY: RUSSELL H. FALCONER, ESQ.**

GIBSON DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071-3197  
**BY: DEBORAH L. STEIN, ESQ.**

Monday - July 13, 2020

8:32 a.m.

P R O C E E D I N G S

**THE COURT:** Calling Civil Action 18-2842, In Re Facebook. Counsel, starting with plaintiff, please state your appearances.

**MR. LOESER:** Good morning. It's Derek Loeser for plaintiffs.

**THE COURT:** Good morning.

**MS. WEAVER:** Good morning, Your Honor. Leslie Weaver with BFA. Anne Davis and Angelica Ornelas are with me.

**THE COURT:** Good morning.

**MR. KO:** Good morning, Your Honor. David Ko, Keller Rohrbach, also on behalf of plaintiffs.

**MS. LAUFENBERG:** And good morning, Your Honor. Cari Laufenberg on behalf of plaintiffs.

**THE COURT:** Good morning. So, for Facebook?

**MS. STEIN:** Good morning, Your Honor. I saw Orin Snyder's name up a moment ago, but it looks like he's no longer on this screen.

**THE CLERK:** I promoted him, and I don't see him.

**MS. STEIN:** I'm getting text messages saying there is a little bit of a technical error, but I think he'll be on momentarily.

**THE CLERK:** Okay.

**MS. STEIN:** Yeah. He says it says "Waiting."

1 And, this is Deborah Stein for Facebook. And I'm here  
2 with Martie Kutscher Clark. And hopefully Orin Snyder will be  
3 here in a moment. I'm not sure; maybe he should disconnect and  
4 try again.

5 Do you think that's the best thing, for him to hang up and  
6 try again?

7 **THE CLERK:** Sure. I mean, as soon as I see his name,  
8 I will promote him to a panelist.

9 **THE COURT:** No apologies needed.

10 (Off-the-Record discussion)

11 (A pause in the proceedings)

12 **MR. SNYDER:** (Inaudible)

13 **THE COURT:** Can't hear you, Mr. Snyder.

14 **MR. SNYDER:** Okay. I apologize. My iPad was not  
15 allowing me to connect, so now I'm on my iPhone.

16 **THE COURT:** We can see you now.

17 **MR. SNYDER:** Okay. Great. Thank you so much. I  
18 apologize. I don't know why.

19 **THE COURT:** Not a problem. Not a problem. Why don't  
20 you go ahead and make your appearance; everyone else has.

21 **MR. SNYDER:** Okay. Orin Snyder for defendants, from  
22 Gibson Dunn. Thank Your Honor.

23 **THE COURT:** We do have a court reporter this morning,  
24 taking down the transcript.

25 All right. So thank you very much, everyone, for your

1 statements. I thought we should just discuss them, the issues,  
2 in the order the parties presented them.

3 First, with respect to plaintiffs' document production.  
4 Not really sure, plaintiffs say they're not withholding  
5 anything.

6 The only thing I guess that Facebook raised was some  
7 potential dispute regarding the production of documents versus,  
8 maybe, interrogatories. But I didn't understand plaintiffs'  
9 statement to say that they were refusing to produce those  
10 documents.

11 I don't know if anyone from the plaintiffs wants to  
12 respond.

13 **MS. WEAVER:** Angelica Ornelas will be addressing this  
14 for us, Your Honor.

15 **MS. ORNELAS:** Thank Your Honor.

16 So I think what we've tried to do here is explain that we  
17 are searching for responsive materials, to the extent that they  
18 are in plaintiffs' possession.

19 What we are excluding from the search are materials from  
20 the user account and user archive, itself, for a couple of  
21 different reasons. One is as to the offensive ads that  
22 Facebook is seeking, it's not clear that that content is  
23 located within those sources, to begin with. There does appear  
24 to be identification of advertisers that sent content to the  
25 users. But the ads, themselves, do not appear to be in the

1 archive.

2 So that is one of the reasons why we don't think that  
3 should be is encompassed within our search. If that helps.

4 **THE COURT:** Well, what you're saying is that you  
5 can't produce them. That you don't -- you don't have the  
6 ability to produce them.

7 **MS. ORNELAS:** From the Facebook user account and  
8 archive.

9 But otherwise, if the plaintiffs do have standalone  
10 records of things like the offensive ads that Facebook is  
11 seeking, we are searching and collecting those items.

12 **MS. KUTSCHER CLARK:** Your Honor, if I could respond  
13 to that for a minute, I'd appreciate it.

14 **THE COURT:** Go ahead.

15 **MS. KUTSCHER CLARK:** The issue here isn't limited to  
16 advertisements.

17 And I just want to start by saying we're not seeking  
18 discovery from the there was here to abuse the plaintiffs, or  
19 to harass them. It's because we think this case should have  
20 been dismissed on standing grounds at the motion-to-dismiss  
21 stage, and Judge Chhabria held that we would have an  
22 opportunity to seek discovery from the plaintiffs regarding  
23 their allegations, and an opportunity to move to dismiss  
24 individual plaintiffs on standing grounds.

25 And to that end, the plaintiffs have a lot of allegations

1 in their complaint, not just about the advertisements, to the  
2 effect that because of conduct Facebook engaged in, they  
3 experienced certain activity on the Facebook platform.

4 That includes that the plaintiffs received what they call  
5 highly offensive advertisements; that they received friend  
6 requests from people they call "trolls" who they didn't  
7 actually know; that they experienced third-party interference  
8 with their accounts, so someone who was not them was posting on  
9 their accounts. We have requested information from plaintiffs  
10 regarding those allegations.

11 So for instance, documents sufficient to show any highly  
12 offensive advertisements they actually received, or documents  
13 sufficient to show any friend requests they received from  
14 trolls, so people they didn't actually know. And plaintiffs  
15 seem to have taken the categorical position that they will not  
16 produce any materials from their Facebook accounts.

17 And for us that's problematic, because Facebook's not in a  
18 position to identify that information. We don't know if a  
19 particular friend request came from someone the plaintiffs knew  
20 or did not know, whether a post on their account was a post a  
21 particular plaintiff actually made, or whether a third party  
22 gained access to an account maintained that post.

23 So we're just requesting materials to show that type of  
24 information.

25 **THE COURT:** But I don't understand -- I don't hear

1     them saying that they're refusing to identify that. Of  
2     course, that's relevant. That's not what I heard.

3           I guess what I heard is they don't -- they don't know how  
4     they could necessarily access and show that to Facebook, but  
5     they could identify for it. The allegation was made in the  
6     complaint, so obviously, they have to be able to identify it.

7           Is that what you're saying, Ms. Ornelas?

8           **MS. ORNELAS:** Your Honor, to the extent that the  
9     plaintiffs do have those records in their possession, custody,  
10    or control, they're going to be produced. However, to the  
11    extent that Facebook is asking us to search through the  
12    Facebook user platform and archive, the records that they are  
13    requesting don't appear to be contained in those sources.

14          So we are agreeing to search and collect materials, to the  
15    extent they exist. But for -- for right now, it doesn't appear  
16    like those materials are within the platform and the archive,  
17    which is why we are anticipating carving them out of our  
18    search.

19          **THE COURT:** And just to -- how would they identify --  
20    how would they go about and find to produce to Facebook an ad  
21    that they found, that they believed was offensive?

22          **MS. KUTSCHER CLARK:** Sure. So there's a lot of ways  
23    that they could do this. And we've actually discussed this  
24    previously, so I'm a little surprised to hear the response  
25    today, because previously the response has been: If you want,



1 we can look.

2 So for instance, on Facebook plaintiffs have a feature  
3 called: Download your information. And you can download there  
4 sort of a history of all of your activity on Facebook, and  
5 pretty much everything you've ever done on Facebook. And they  
6 would be able to find a lot of this information there.

7 Many Facebook users --

8 **THE COURT:** Would it show ads?

9 **MS. KUTSCHER CLARK:** I don't know, off the top of my  
10 head, if it would show every ad, but I believe certain  
11 advertising information would be reflected there.

12 A lot of this information also comes across through  
13 emails. So a lot of users have their accounts set up to send  
14 information to them by email, as well, so users would receive  
15 emails.

16 And I do just want to clarify, we're not just talking  
17 about advertisements. You know, some of this is about friend  
18 requests people received. And they --

19 **THE COURT:** I'm just taking -- I'm just taking it --  
20 I'm taking it one at a time. Because you said that they  
21 refused, I -- I'm just not hearing that. I'm just trying to  
22 figure out.

23 How would they -- I know they could describe to you an ad  
24 that they recall seeing that they found was offensive. I'm  
25 trying to figure out, because this is a dispute about a

1 document production, how -- how are you saying they should  
2 actually produce to you that ad?

3 What is the search that they're supposed do? What -- at  
4 least for the ads, I don't think you know.

5 Okay. So now as to --

6 **MS. KUTSCHER CLARK:** No. For their ads, I see three  
7 ways they could find the information. First, they could go  
8 through their download-their-information file, and any ads  
9 that are contained within it they could produce the relevant  
10 pages of their download-their-information file or, you know,  
11 screenshot it and produce it.

12 To the extent any ads were received from Facebook by  
13 email, they could produce those as emails. To the extent any  
14 ads are currently on their Facebook news feed, they could  
15 produce those materials by, again, either screenshotting or  
16 PDFing the pages.

17 **THE COURT:** Okay. So, Ms. Ornelas, are you  
18 downloading the information files for your clients?

19 **MS. ORNELAS:** Sure, Your Honor. So when we -- we  
20 have downloaded that information. And that's what I was  
21 referring to earlier, where it appears that within that file,  
22 there is some limited advertiser information. The ads,  
23 themselves, do not appear to be located within that file.

24 With respect to, you know, stand-alone emails or  
25 screenshots, that is something that we are searching for, and

1 collecting, and reviewing.

2 The issue is to the extent that Facebook believes the ads,  
3 themselves, are within the download file that Ms. Kutscher just  
4 described, that's where I think the disconnect is here.

5 **MS. WEAVER:** Your Honor, if I may just explain, the  
6 archive that we're talking about is a select subset of users'  
7 platform activity that Facebook designates and allows users to  
8 download. Ordinarily, users don't that. And that's --  
9 Facebook produced that to us, already. So when Ms. Ornelas  
10 says that they excluded advertisement, that's because it is  
11 not the entire world of Facebook activity.

12 And I think it's exactly right that, really, the  
13 information that Facebook wants is better suited to a  
14 contention interrogatory or a deposition. It's really not a  
15 document request that's proportional to the needs here, because  
16 we can communicate that. And the second piece is --

17 **THE COURT:** Well, why -- I don't hear -- I don't hear  
18 that it's proportionality. I hear that you don't have it.

19 **MS. WEAVER:** That's true, as well. I guess the  
20 question is, yes, could we go through the archives and maybe  
21 identify some reference to an ad? I don't know.

22 But these are, you know, highly -- these are -- they're  
23 not sorted that way. There's no section that says: Here are  
24 the advertising. We're not aware that we have it. If Facebook  
25 produced it to us, maybe that would help. But we don't have

1     them right now.

2             And Facebook knows what advertisements it serves to these  
3     plaintiffs. Right? They know what agreements they have, and  
4     who's been allowed to advertise on the platform.

5             But, you know, for example, to come at this another way,  
6     let me just say that our allegations aren't -- really, the  
7     heart of the case is not about specific individual  
8     advertisements. Although, each of our plaintiffs received  
9     notice that Cambridge Analytica obtained their data, so  
10    Facebook knows that already.

11            But the heart of our case is that it's the volume of data  
12    and advertisements that people got because Facebook was  
13    funneling all of this information out.

14            And we still don't even have from Facebook documents  
15    sufficient to show which third parties accessed their data. If  
16    Facebook produced that to us, which they still haven't, we  
17    could go to our plaintiffs and say: Of these millions of apps,  
18    which do you find offensive that were advertising to you?

19            But it's kind of asking us to answer from information that  
20    Facebook exclusively has. And that's -- that's one of our  
21    issues.

22            **THE COURT:** Well, it's kind of a chicken -- it's a  
23    chicken-and-egg thing, I think. I don't know about that. But  
24    -- I don't know if I necessarily agree with that.

25            But it does sound like the way to approach this is, first,

1 perhaps to do it as interrogatories. And then the plaintiffs  
2 will identify, you know: These are the ads...

3 Whatever the question is, whatever your question is about  
4 standing, ask that. And then perhaps then go to the documents.

5 **MS. STEIN:** Your Honor, if I may, to that point, I  
6 think our issue here is as we were meeting and conferring, we  
7 were repeatedly told by plaintiffs that they wouldn't search  
8 for these various things like troll requests, and -- and these  
9 were things that were specifically pled. We did not hear from  
10 plaintiffs that they did not have access to this information.

11 Obviously, if they don't have it, they don't have it. But  
12 for some of these -- and Martie, I think, was going to go on  
13 into detail which ones they were. For some of these  
14 categories, plaintiffs have it. They can say -- if there's  
15 something on their Facebook -- in their Facebook history that  
16 shows activity that weren't their (audio interference) post,  
17 they should produce those to us. They've been telling us they  
18 won't even search.

19 And, you know, the suggestion that there's some  
20 proportionality issue here, I mean, that's the first time we've  
21 heard that this case has some sort of proportionality problem.  
22 I mean, we've been working night and day on production on our  
23 end. We keep getting told about how huge this case is from  
24 plaintiffs' perspective.

25 So I think having them do some searching of the accounts

1 to produce a very discrete number of documents is not a lot to  
2 ask.

3 And our fear that is going down the interrogatory path,  
4 we're then going to be told that a contention 'rog is  
5 premature, and they don't have the information. We're just --

6 **THE COURT:** No, no, no. No, because I'm telling you  
7 now, I'm saying, they're suggesting do that first. They made  
8 the allegations in their complaint. So, what is the  
9 information that they had that those allegations were based  
10 on? Right? That's what you want to know first.

11 And then -- I mean, to the extent there is some friend  
12 requests, for example, they say that they got that they weren't  
13 aware of or that they believe was a troll, that they should be  
14 -- is there any reason, Ms. Ornelas, you can't identify that?

15 **MS. ORNELAS:** Your Honor, this goes back to the way  
16 that the information is provided in the download file. There  
17 are certain lists of different types of friend requests, for  
18 example accepted friends, removed friends, rejected friends.  
19 There is, you know, no list within the download file of, you  
20 know, particularly suspicious friend requests.

21 So to the extent there are suspicious friend requests  
22 captured within those different lists, that would be something  
23 that, of course, we could respond to an interrogatory asking us  
24 to identify which of the requests appearing on these different  
25 lists were considered suspicious.

1           **MS. KUTSCHER CLARK:** Well, --

2           **MR. LOESER:** Your Honor, Derek Loeser --

3           **MS. KUTSCHER CLARK:** -- if I can respond to that, I  
4 think the concern is we're not asking for plaintiffs to look  
5 at their file and send us a specified list by Facebook of  
6 suspicious friend requests. We can see who requested them to  
7 be friends.

8           We need them to identify for us: Which were the friend  
9 requests that you thought were from trolls? Who were the  
10 people you don't actually know in real life? And we have no  
11 way to do that.

12           So I think what Ms. Ornelas is saying is they are able to  
13 look at the file and, you know, it might not be captured in one  
14 particular area, they might have to do some work, but they're  
15 able to see a record of who requested their clients to be  
16 friends.

17           And we would like them to produce the pages of the file  
18 that show friend requests from people they did not actually  
19 know, who they believed to have been trolls.

20           **THE COURT:** All right. But the first half of that  
21 sounded like an interrogatory. You want them to identify  
22 those friend requests. But I mean -- maybe it goes hand in  
23 hand, because they identify it by looking at the page, and  
24 seeing it.

25           Mr. Loeser, you wanted to say something?

1           **MR. LOESER:** Yeah. I think, Your Honor, you're on --  
2 I think you've sort of figured out exactly what the problem  
3 is, and your suggestion is a good one, and one that -- it's  
4 working talking about for a minute.

5           Certainly, a contention 'rog asking them to explain the  
6 basis for allegations in the complaint, that does -- that's  
7 always seemed to us like what this request was really after.  
8 Because they're not asking for information; they've all the  
9 information. They're asking us to characterize the  
10 information. And that's exactly what a contention 'rog is.

11           And obviously, if we receive that 'rog, we'll answer it  
12 with the information we have. But I think it is also very  
13 true, we don't yet have from Facebook the most critical  
14 information in this case, which is who did they give our  
15 plaintiffs' data to or sell access to, and what information did  
16 they provide.

17           Once we have that information, we can completely answer  
18 the contention interrogatory. But at present, we can only  
19 answer with what limited information we have.

20           **THE COURT:** You can answer it, based on the  
21 allegations that you made in the complaint. I mean, that's  
22 the whole -- it's a chicken-and-egg thing, right?

23           Because their argument as to standing that Judge Chhabria  
24 will have to decide is if you didn't know that you were  
25 receiving a friend request from someone suspicious, how you



1 were harmed by it. Right?

2 **MR. LOESER:** Right.

3 **THE COURT:** Right? So that's sort of a chicken and  
4 egg. So to say: Well, until we know who sent it -- no. You  
5 made allegations in the complaint of some injury, thus far.

6 And they want to know, what is that based upon.

7 **MR. LOESER:** Right. I would --

8 **THE COURT:** Sounds like -- I don't know --

9 **MR. LOESER:** Yeah, I guess --

10 **THE COURT:** I don't know if I'd call it a contention  
11 interrogatory so much as like: Identify for us, you alleged  
12 X. Okay, who is -- who did the friend request come from?

13 **MR. LOESER:** Right. I guess I would describe it as  
14 part of a chicken and an egg. Because they've focused on this  
15 one aspect of the case which is, you know, ads that people  
16 received that they found offensive.

17 But the heart of the case is they took information, user  
18 data, and they shared it with third parties. That then led to  
19 a variety of things. One of those things was ads that people  
20 found offensive.

21 But the basis of the case is that they took data, and they  
22 shared it without consent.

23 But I hear what you are saying.

24 **THE COURT:** Well, that's your argument to Judge  
25 Chhabria. And I get it.

1 Like, you may think okay, you can whack that away, but  
2 you're not going to win your standing argument, anyway.

3 Okay, but they're still entitled to do their discovery on  
4 what they believe their argument is, to make their argument. I  
5 mean, I -- I hear what you're saying. But that doesn't mean  
6 they don't get the discovery on those allegations.

7 **MR. LOESER:** Right.

8 **THE COURT:** It may ultimately not prevail. But this  
9 is just discovery.

10 Okay. So --

11 **MR. LOESER:** To be clear, though -- I'm sorry,  
12 Your Honor. But to be clear on what we would be able to do if  
13 we received a contention interrogatory today, we would be able  
14 to answer with regard to the information we have at present.

15 But as discovery unfolds and we get the information we're  
16 waiting for, then obviously, that would be supplemented with a  
17 lot more information.

18 **THE COURT:** Right. But what I understand  
19 Ms. Kutscher saying is you made certain allegations in the  
20 complaint, and they want to know the basis for them now.

21 And to the extent, then -- for example, if your clients  
22 had in mind particular friend requests, if they did, then, you  
23 know, look at that file and -- or -- I don't know how you would  
24 do it or if you can do it -- identify that friend request.

25 **MS. WEAVER:** Your Honor, we will do that. And we

1 have always said we would search for everything off the  
2 platform, which is what we had when we filed.

3 I mean, the other piece, of course, and the proof problem  
4 in the case at a specific level is that Facebook, itself, has  
5 said they can't identify how our individual plaintiffs were  
6 harmed.

7 And certainly, the friends of friends, when friends gave  
8 permission so that third parties I didn't know about because  
9 they downloaded those apps, that's what we need to try to  
10 understand from Facebook how those systems work.

11 Because I -- this is one of those odd cases where the  
12 plaintiffs don't know specifically how they were harmed. They  
13 just know the vol- -- that's not sweeping. But in some sense,  
14 there's two pieces. There's the narrow, kind of, what happened  
15 to me specifically, and what offensive ads.

16 And then there is the larger portion of the case, which  
17 is: I didn't understand that when I was sending a private  
18 message and attaching a photo to one friend, that that data and  
19 information was being sent to literally so many third parties,  
20 Facebook tells us they can't identify them all.

21 And so we're still working on that second piece. And  
22 that's why we keep hearing it as sort of a contention  
23 interrogatory.

24 But we will give them the information we currently  
25 possess, and identify and respond to a 'rog based on what we

1 now know, but we're just conditioning that on there's a lot  
2 that we have yet to learn.

3 **THE COURT:** No, no, no, I understand. And that's an  
4 argument for Judge Chhabria in terms of what the --

5 **MS. WEAVER:** Got it.

6 **THE COURT:** -- was, and the standing, as to  
7 discovery.

8 **MS. KUTSCHER CLARK:** And I do want to be clear if I  
9 may, for a second, I think that the argument that Ms. Weaver  
10 is making might apply to certain types of requests, and we  
11 don't need to dig into those right now.

12 But the specific ones that we're talking about, for  
13 instance, friend requests from trolls, there's no information  
14 that plaintiffs would need from Facebook to identify friend  
15 requests from people they don't know. The plaintiffs either  
16 knew the people, or didn't know the people. I don't think  
17 there's something they would need from Facebook to identify  
18 that.

19 Another one of the requests has to do with interference on  
20 their Facebook accounts. So one of the things we want to know  
21 is: Were there posts on your account? Did something appear on  
22 your wall that you didn't do, yourself?

23 The plaintiffs don't need information from Facebook to  
24 say: This post on my wall this day wasn't from me. Someone  
25 else did it.

1       That's the type of stuff we're seeking right now, because  
2       there are allegations about those things in the complaint. So  
3       I don't think there should be any delay answering questions  
4       like that.

5               **MS. WEAVER:** We will answer with what --

6               **THE COURT:** What they need to do is review the  
7       downloaded file from the user activity. And it may or may not  
8       be in there. I just don't know how complete it is.

9       Like, somebody sitting here today probably can't remember  
10      the name, exactly, or anything like that. Right? So they need  
11      to review the file. And maybe it's in there, maybe it's not.

12      But, I guess I don't hear the plaintiffs saying that their  
13      clients aren't going to be reviewing that downloaded file.

14              **MS. ORNELAS:** Well, Your Honor, that file, when  
15      taking into account the volume that it measures to date, we're  
16      talking about 116,000 documents that total, you know,  
17      somewhere in the ballpark of 46 gigabytes of data.

18      So that is a significant volume to be searching, which is  
19      why our initial position was carving that voluminous source  
20      out, and instead, focusing on the documents that plaintiffs  
21      have, things like screenshots or emails, things like that.

22      Because what we do know is, for example, when there is a  
23      suspicious log-in attempt, a user is notified by Facebook, at  
24      least that's my understanding. And they get an email that  
25      says: Hey, was this you? You have logged in from halfway

1 across the globe.

2 So things like that, you know, we are searching for. But  
3 to the extent that, you know, Facebook thinks it's proportional  
4 to have us search through that volume of data without knowing  
5 whether that kind of content is in the download file itself, we  
6 just don't think that that is, you know, proportional at this  
7 time.

8 Particularly when --

9 **THE COURT:** I guess I don't -- I don't understand.

10 So either -- like, either it shows friend requests, or it  
11 doesn't. And if it doesn't, it doesn't. You can figure that  
12 out.

13 **MS. KUTSCHER CLARK:** It does, yes.

14 **THE COURT:** All I will say is this: The plaintiff  
15 certainly can't argue standing based on some friend requests  
16 that they then didn't search for within their file. That's  
17 all.

18 I mean, you'll produce whatever evidence you produce,  
19 right? And then that's it. You're held to it.

20 So that's -- that's the direction I'm going to give.  
21 That's all. I mean, I don't really quite --

22 **MS. WEAVER:** I understand Your Honor.

23 **THE COURT:** Yes, it will take the plaintiff some time  
24 to cull through their files. Okay. They're the named  
25 plaintiffs.

1           **MS. WEAVER:** Yeah. We will do that, Your Honor.

2           I think the other point, though, is that there is -- there  
3 remains -- for example, if Facebook has a list of trolls and  
4 had a list of suspicious apps and we can show them to our  
5 plaintiffs, they may remember.

6           But I hear your point. We'll give the specific  
7 information we have now. And later on, we will be -- we'll be  
8 amending any 'rog responses, once discovery is complete. And  
9 then a judge can make a ruling on standing.

10          **THE COURT:** Okay. Okay. All right.

11          Let's see. So the next area was the app developer  
12 investigation. And so --

13          **MR. SNYDER:** Your Honor, may I be heard on that one?

14          **THE COURT:** Yes.

15          **MR. SNYDER:** So Your Honor, thank you. This is both  
16 not right, and also not accurately described by the plaintiffs  
17 in the submission.

18          Let me be very brief. The so-called "app developer  
19 investigation" is an internal investigation conducted by my law  
20 firm, Gibson Dunn, in the wake of the Cambridge Analytica  
21 events, commenced in 2018.

22          And the purpose of this internal investigation that my  
23 partner Al Southwell is leading was to advise Facebook about  
24 legal risks and exposures, including in this lawsuit  
25 (Indicating), relating to apps on the Facebook platform prior

1 to 2015. It's been ongoing since that time.

2 And first, plaintiffs wanted every single document  
3 relating to that internal investigation, including my law  
4 firm's files. That was obviously overbroad.

5 To be clear, we are producing documents relating to this  
6 investigation. What I mean by that, Your Honor, is when my law  
7 firm, working with Facebook and outside consultants, discovered  
8 activity prior to 2015 involving third-party apps that it  
9 wanted to follow up with, and communicated with those  
10 third-party apps, those communications are not privileged.  
11 Those communications we are producing, and have produced. In  
12 fact, we have already produced 16,000 documents related to the  
13 investigation. And as we continue our production, we will  
14 continue to produce thousands of documents relating to the  
15 investigation.

16 What we are objecting to, and only objecting to, is core  
17 attorney/client and work-product communications, such as my law  
18 firm's internal analysis. Such as communications between my  
19 law firm and counsel at Facebook concerning the investigation.

20 What we propose makes sense here is that we conclude our  
21 production relating to this internal investigation. And once  
22 plaintiffs have reviewed these materials and identified apps  
23 that they believe to be relevant, or want -- or -- or want  
24 additional documents, they can issue more tailored requests for  
25 information specific to particular apps.



1       For example, let's assume hypothetically in 2012 there was  
2       some app that did something that the investigation uncovered.  
3       We then, as part of our investigative protocol, communicated  
4       with that app. Call it App X. We wrote them a letter. That  
5       letter will be produced and they will then have the name of  
6       that app. And any communications with that app.

7       In one or two instances, only, we actually -- I think one,  
8       maybe, we filed a lawsuit against a company. That is all  
9       public.

10       After they review those documents, we can take -- we can  
11       then meet and confer, and there can be a live dispute. Right  
12       now, there is no live dispute other than they say they want  
13       everything. And they are focusing on a Massachusetts Superior  
14       Court ruling. And as we told the Court -- which -- which --  
15       which was a motion to compel by the Massachusetts Attorney  
16       General regarding a completely different -- substantially  
17       different document requests than plaintiffs.

18       We objected to that request in Massachusetts because, as  
19       framed, it did invade attorney/client privilege, work product,  
20       and the like. The Superior Court ruled against us.

21       But Facebook took that up to the Supreme Judicial Court in  
22       Massachusetts, and they granted the extraordinary review of the  
23       Superior Court's work product determination. That is in  
24       litigation. And so nothing that's happening in Massachusetts  
25       should either bind or control here.

1           This is not right. When they get the tens of thousands of  
2 documents they will see that there are -- I'm making it up --  
3 ten, 20, 30, 40, 50 different apps -- maybe more, I don't know  
4 the number -- maybe Martie does -- with which we communicated  
5 as a result of our investigation. They'll know the names of  
6 those apps. They can then follow up and ask questions about  
7 those apps. We're going to turn over all those documents.

8           What we're not turning over is our law firm's files, and  
9 our communications with our client that were all pursuant to  
10 this privileged investigation.

11           **THE COURT:** When is that production going to be  
12 complete?

13           **MR. SNYDER:** Martie?

14           **MS. KUTSCHER CLARK:** So we made a production on  
15 Wednesday that included about 10,000 additional pages of  
16 materials with the third parties. We're continuing to review  
17 them. The volume is extraordinarily high, because it includes  
18 every communication with apps about this investigation.

19           I think it would probably take us another several weeks to  
20 work through the rest of the documents. I think it's in the  
21 range of tens of thousands of additional documents to review.  
22 And we're actively working on that.

23           But again, these include every letter that went to an app  
24 saying they were suspended, and why. So once the production is  
25 complete, plaintiffs will have the ability to identify any apps

1 that were suspended for reasons they're concerned about, or  
2 that are actually relevant to the case.

3 And as Mr. Snyder said, then they could request additional  
4 information about those apps, and we'd have something narrower  
5 and more tailored that we can focus on.

6 **MR. KO:** Your Honor, this is David --

7 **MR. SNYDER:** Let me make one more point, Your Honor,  
8 because -- so there's nothing -- there's no sort of nefarious  
9 suggestion.

10 As it turns out, the vast majority of apps that were  
11 suspended were suspended because we wrote them, saying: "Dear  
12 Mr. or Mrs. App, we have these questions for you," and they  
13 never wrote back. Probably out of business, or didn't care.

14 We then suspended them for non-compliance with our  
15 platform rules because they simply ignored our initial inquiry.

16 So I think a high majority, if not in the nineties, high  
17 nineties of the so-called suspended apps (Indicating quotation  
18 marks) are just apps about which we had questions and followup.

19 And then they never wrote back to us, and we said "You're  
20 suspended because you're a scofflaw, you didn't respond to us."

21 **MR. KO:** This is David Ko on behalf of plaintiffs.

22 May I respond?

23 **THE COURT:** Yes.

24 **MR. KO:** So I'm a bit surprised, first of all, that  
25 Mr. Snyder says this issue is premature. We have been going

1 back and forth on this.

2 And as you know, in last hearing, you did direct Facebook  
3 to try and get to a final position on this issue so that we  
4 could actually brief it. We thought we came to some sort of  
5 final position, as you can tell from what Mr. Snyder is saying.  
6 He refuses to actually have a final position on this.

7 And on the communications in particular that they are  
8 claiming they will produce to suggest that we should narrow our  
9 subsequently -- subsequently narrow our request, that doesn't  
10 make sense to us for a variety of reasons. Including, most  
11 notably, the fact what they are offering to produce here are  
12 internal communications with third parties. That has nothing  
13 to do and has no bearing on the relevance of the internal  
14 documents and communications that we are entitled to.

15 I understand what Mr. Snyder is saying, that there is a  
16 certain degree of those communications that could be  
17 privileged. But it is inconceivable that all of them are. And  
18 all you have to do is take one look at the statement that we  
19 attached or the exhibit that we attached to our statement that  
20 shows their publicly-available announcement about this ADI in  
21 which they claim -- Facebook claims -- that this is something  
22 that involved hundreds of people. Not just attorneys. Right?

23 They don't say it's an employer-driven investigation.  
24 They say this involved external investigators. They say it  
25 involved policy groups at Facebook. They say it involved

1 engineers, hundreds of people that were involved in this  
2 investigation. Platform operations folks. Developer  
3 operations.

4 This resulted -- this investigation -- which is ongoing,  
5 by the way -- has resulted in thousands, tens of thousands of  
6 apps being suspended.

7 So even if Mr. Snyder is correct in saying that the vast  
8 majority of them relate to some sort of investigation in which  
9 third parties did not respond, you still have a substantial  
10 amount of third parties that are potentially in violation of  
11 Facebook's (Inaudible).

12 So --

13 **MR. SNYDER:** And -- and plaintiffs will get the names  
14 of any -- plaintiffs will get any communications that we had  
15 with any third-party app which puts them on notice of either a  
16 perceived, suspected or actual violation. They will have,  
17 chapter and verse, the names, serial numbers, addresses of  
18 those apps.

19 **MR. KO:** Yeah.

20 **MR. SNYDER:** And the fact is, yes -- the fact is this  
21 was a large investigation, because the company committed to  
22 conduct a retrospective investigation to see if there was a,  
23 quote, "another Cambridge Analytica out there," close quote.  
24 Turns out there wasn't.

25 Having said that, it takes a lot of engineers and a lot of

1 people at the company, and a lot of lawyers, I might say. It  
2 wasn't just Mr. Southwell. We had a big team of lawyers  
3 working with a big team at Facebook to look prior to 2015 at  
4 every single third-party app to determine which ones complied,  
5 and which ones didn't.

6 And the plaintiffs are going to have a cornucopia of  
7 information about third-party apps. And I just would  
8 respectfully suggest that they be a little patient.

9 As Martie said, we're going to complete the production.  
10 And I assume they'll have a lot of questions to ask about those  
11 apps, and a lot of work to do to follow up. And we will follow  
12 up with respect to any third-party communications with those  
13 apps.

14 So --

15 **MR. KO:** The fundamental disconnect is, so,  
16 Mr. Snyder is basically suggesting that we just received this  
17 information, right, about external communications that they  
18 had with third parties, and a potential list of these apps.

19 We are entitled to much more. This is discovery related  
20 to our case that is fundamentally about Facebook allowing  
21 third-party app developers to misuse and abuse it. Information  
22 of user content information.

23 External communications with third party developers is one  
24 tranche of that. Right? Internal documents and communications  
25 related to their analysis from non-attorneys that are not

1 privileged are obviously relevant and responsive to our  
2 requests regarding their enforcement policies. And so that's  
3 what we're asking.

4 And that's what the disconnect is here, Your Honor.

5 **THE COURT:** So is it Facebook's position that, for  
6 example, any communications among engineers that didn't  
7 involve attorneys, because they all come under the umbrella of  
8 this lawyer-directed investigation, they're privileged?

9 **MR. SNYDER:** Your Honor, the engineers were all  
10 working. There were internal legal teams, external legal  
11 teams. And everything that was done within the rubric of this  
12 investigation is at the direction of counsel.

13 Let me make another point though, Your Honor, just to be  
14 clear --

15 **THE COURT:** So that's --

16 **MR. SNYDER:** Yes. Yes.

17 **THE COURT:** I just want know if that's a yes.

18 **MR. SNYDER:** Yes, yes.

19 **THE COURT:** All right. So --

20 **MR. SNYDER:** But Your Honor, here's what plaintiffs  
21 have failed to mention.

22 This so-called "ADI," which is really an internal legal  
23 investigation, is separate and apart from Facebook's normal and  
24 regular enforcement activities.

25 Facebook has an enforcement team. And all it does is

1 enforce the rules and regulations and policies on the platform.  
2 That enforcement team works with engineers on a regular basis,  
3 and -- and is not done at the -- in the ordinary course, under  
4 the direction of counsel.

5 And we have produced and will produce numerous documents,  
6 because plaintiffs have asked for them, concerning our ordinary  
7 enforcement activities which do involve engineers and policy  
8 people. And that stands in sharp contrast to the legal  
9 investigation that my firm conducted.

10 And so -- and Martie, I don't know what the volume of  
11 those documents are, but they are fairly voluminous.

12 **THE COURT:** Okay. But what I guess I don't  
13 understand, at some point you're going to have to produce a  
14 privilege log. Because just because you say they're  
15 privileged doesn't mean that the plaintiffs have to accept  
16 that.

17 So I'm trying -- so when -- when do you intend to do that?

18 **MS. KUTSCHER CLARK:** If I could respond briefly,  
19 because I think there's a little bit of a misunderstanding  
20 here.

21 The concern we're having at the moment is the requests  
22 we're receiving from plaintiffs keeps changing. When we came  
23 before the Court last time, we were under the impression that  
24 the plaintiffs were seeking the materials that the  
25 Massachusetts AG'd requested. So we went back and we talked to



1 the plaintiffs about our position as to those materials.

2 During that discussion, the plaintiffs told us for the  
3 first time -- or at least we understood for the first time --  
4 that they are seeking every single document from the  
5 investigation, about the investigation, related to the  
6 investigation. That's a really different request, and it's  
7 extraordinarily broad.

8 And our position with respect to privilege and whether and  
9 to what extent we could prepare a privilege log is very  
10 difficult to analyze when we're talking about every single  
11 document. It would be a privilege log with millions and  
12 millions of entries. So what we're suggesting right now is  
13 that we finish producing the letters that show who was  
14 suspended, and why, so that the plaintiffs can make a more  
15 tailored request.

16 And at that point, we're not necessarily objecting to  
17 producing any of the underlying information. So for instance,  
18 what we understand the plaintiffs ultimately want is underlying  
19 data showing platform violations, or showing what an app did  
20 with users' data.

21 To the extent that we can uncover that underlying data,  
22 we're not objecting to digging up that data and providing it to  
23 plaintiffs so that they can do their own analysis. What we're  
24 objecting to doing is taking our attorney files and the work  
25 that our attorneys and attorney-led team did to look at that

1 data, and analyze it, and make decisions about that data, and  
2 simply handing it over to the plaintiffs.

3 **MR. LOESER:** Your Honor, if I may, just briefly.  
4 Because again, I think your question went right to the heart  
5 of the matter.

6 If we have two engineers talking about Facebook's data  
7 policies in connection and then fallout from Cambridge  
8 Analytica, can that possibly be privileged. And I think the  
9 reason why we feel like this controversy is ready to be  
10 briefed, the parties are taking positions that are directly  
11 contrary on a large body of information that we believe is  
12 directly relevant.

13 If you go to the exhibit we provided, which is Facebook's  
14 public announcement of the ADI investigation, this does not say  
15 Gibson Dunn lawyers are conducting an internal investigation  
16 for the purpose of legal advice.

17 And I'll just read what it says, because I think it should  
18 give a pretty good idea --

19 **THE COURT:** No, I understand. But you're not  
20 seeking, are you, like, memos among Gibson Dunn attorneys.

21 **MR. LOESER:** No. No. We are not seeking privileged  
22 information. We're seeking --

23 **THE COURT:** Okay.

24 **MR. LOESER:** Yeah. We want the information -- like,  
25 for example, one of the categories of people involved, from

1     their announcement, they say: Among the people involved in  
2     this are policy specialists.

3     They say (As read):

4             "We promised that we would review all of the apps  
5             that had access to large amounts of information  
6             before we changed our platform policies in 2014. It  
7             has involved hundreds of people: attorneys, external  
8             investigators, data scientists, engineers, policy  
9             specialists, platform partners and other teams across  
10            the country."

11     And the next line is really critical for this.

12            "Our review helps us to better understand patterns of  
13            abuse in order to root out bad actors among  
14            developers."

15     That is a business activity, and it is a critical business  
16     activity for this case. We are not interested in the legal  
17     advice and the legal communications. We want the business  
18     activity information that would be produced because it's  
19     directly relevant and responsive. If they want to withhold it,  
20     they need to log it. But it's certainly not going to be  
21     privileged.

22            **MR. SNYDER:** Well, we strongly, respectfully  
23     disagree, because my law firm was involved in every decision.

24            **THE COURT:** Okay, but we're not going to adjudicate  
25     that now.

1           **MR. SNYDER:** Right.

2           **THE COURT:** The question, though, because it's not --  
3       so they're not seeking the stuff that's clearly privileged, so  
4       you don't have to worry about that. And I don't even think  
5       that ever really even needs to be logged, because that would  
6       be a waste of time.

7           But with respect to the other stuff, there's arguments  
8       there. Both ways. Privilege is not clear, and there's  
9       arguments both ways.

10          And so the question is then, how, how -- I certainly --  
11       it's not -- I can't adjudicate that right now, like just  
12       generally out there. It has to be done in context. Right?

13          So maybe the thing to do -- I do, I have to say, I just  
14       think, Mr. Loeser, I understand, but we're not in a great rush,  
15       you noticed, so -- is start reviewing those documents, and then  
16       see -- we can take a subset. Because the way I'm going to be  
17       able to adjudicate this is take some exemplars, and rule, and  
18       then the parties then can use that and apply it. Right? You  
19       don't need the log of every single document.

20          So maybe what you do is you take a particular app, or you  
21       get some names or something, right, and we focus on that  
22       subset, and I adjudicate that. That's not going to resolve the  
23       privilege for everything, but it will be a roadmap that the  
24       parties can then apply. But I think we are going to need a  
25       certain set -- I want it to be in context of a particular

1 document. So the question is: How do we get there.

2 And I don't think we necessarily need to wait until all  
3 the production is done. I don't think that is the case. The  
4 parties should get together and decide on, you know -- I don't  
5 know what it is that the plaintiffs think necessarily are  
6 there. Maybe Facebook can come up with -- I don't know -- a  
7 hundred documents that you're going to log.

8 **MR. SNYDER:** We can also be helpful, Your Honor.

9 And, and -- because the vast majority -- I think it's  
10 99 percent, but that's just from what my partner, you know,  
11 has allowed to.

12 Since the vast majority are people we wrote to and  
13 suspended because they didn't write back to us, you know, maybe  
14 we can highlight a couple of ones where we had further  
15 activity, they wrote back to us, we engage with them.

16 And then we can go behind the curtain, so to speak, on  
17 your exemplar idea, and we can take a look at what our work  
18 product and attorney/client activity was behind the contain,  
19 look at what engineers were doing, and then figure out how to  
20 tee up a privilege exemplar for handful of apps.

21 **THE COURT:** Well, and for example, Mr. Loeser brought  
22 up like policy (audio interference), things like that. That's  
23 not going to be particular to an app.

24 But maybe plaintiffs can point out, you know, because  
25 what's --

1           **MR. LOESER:** Your Honor, you're breaking up on us.

2           (Off-the-Record discussion)

3           (A pause in the proceedings)

4           **THE COURT:** I'm back.

5           **MR. LOESER:** We lost you right when you started  
6 talking about policy specialists.

7           **THE COURT:** I came to the courthouse so I'd have good  
8 internet. I got the Court give me an upgraded laptop, and  
9 it's, like, worse than ever. I'm actually at the courthouse,  
10 where there's very few people here.

11           In any event. So, you know, I think, you know,  
12 plaintiffs -- maybe starting with this -- identify some  
13 documents that you think that you would be entitled to. Like  
14 discussions among the policymakers that Facebook was referring  
15 to.

16           Facebook then, you know, look at them, and just say: Oh,  
17 no, yeah, I can produce those now.

18           But I think we're just going to have to do it sort of in  
19 tranches. But I agree with the plaintiffs, I don't think we  
20 need to wait until the end because I don't think it is  
21 necessarily specific to particular apps.

22           I think this suggests there's broader things going on that  
23 would be relevant, and that may very well not be privileged.  
24 But I don't think there's anything right now. I --

25           **MR. SNYDER:** The reason that makes sense, Your Honor,

1 is that, you know, without reviewing attorney/client  
2 privileges, we did have an internal protocol for this internal  
3 investigation. Sort of an escalation protocol. And so things  
4 did follow a particular prescribed course in the investigation  
5 of an app. And it was a massive undertaking, because the  
6 company had to literally evaluate every app prior to 2015.  
7 And so there is an established protocol that governs  
8 escalation of these app investigations. And policy was  
9 involved in some of those.

10 But I think we -- we can work with plaintiffs, I think,  
11 and identify our own protocol for how to frame the privilege  
12 inquiry, and then key it up for Your Honor when it's ripe.

13 **MR. LOESER:** Well, Your Honor, for the exemplar  
14 approach to work, it would need to be -- let's take policy  
15 specialists, for example. We would say: Look, we want -- and  
16 I don't know if there's a way for us to connect it to some  
17 particular app or not; it depends on what other discovery we  
18 got. But we want all the conversations and discussions that  
19 relate to -- in which policy specialists were involved.

20 For the exemplar to work, Facebook would then need to  
21 provide that, or produce a log that identifies everything that  
22 they're not providing. It can't be some cherrypicked set of a  
23 couple of documents here and there that try to somehow prove  
24 the point that Orin's trying to make. It needs to provide the  
25 parties with the full ambit of the information, so that we can

1 then meaningfully brief the dispute.

2 **THE COURT:** So of the --

3 **MS. STEIN:** It sounds like we have our work cut out  
4 for us on a meet-and-confer, Your Honor. I mean, this is one  
5 of the issues that we've been trying to focus plaintiffs on,  
6 which is the over-breadth of the request. And we've been  
7 trying to discuss: What do you actually want?

8 And so I think this will help give us some structure for a  
9 meet-and-confer process, so that we can get a better sense as  
10 to what plaintiffs are looking for.

11 **THE COURT:** Well, they actually do want everything.  
12 They do want everything.

13 **MR. SNYDER:** Yes.

14 **THE COURT:** They recognize there are certain things  
15 that they can't get, because of privilege. But the thing is  
16 that there's a fine line in these types of things, what is  
17 privileged and what's not privileged. And so, yeah. So what  
18 they want is everything. That is true. But they recognize  
19 there's some things they can't get.

20 But maybe it's to take it off in chunks. Maybe, you know,  
21 start with the policy stuff. But that's going to take some  
22 work, then, reviewing it, saying: Well, maybe we can't really  
23 defend privilege here.

24 Or if you're going to log it all, then log it all, and  
25 we'll make a decision. I think you probably can approach it



1 that way.

2 **MR. KO:** Your Honor, David Ko --

3 **MR. SNYDER:** Yeah, the problem --

4 **MR. KO:** Just one -- one more point to make in  
5 response to what both Mr. Snyder and Mr. Stein have been  
6 saying.

7 So, the exemplar approach and the sample documents.  
8 Again, all that they are offering to produce to us are external  
9 communications and (audio interference) with third parties.

10 As Mr. Loeser was indicating, there are a whole swath of  
11 documents related to internal documents and communications  
12 regarding their analysis, right, that may not have escalated to  
13 the point of notifying a third party regarding this escalation  
14 protocol that Mr. Snyder alludes to. Right?

15 And so there are a wide range of categories of documents  
16 that we are entitled to, based on our discovery requests.

17 **THE COURT:** No, Mr. Ko, I understand. I'm not  
18 limiting it. What I'm saying is, there's no way I can resolve  
19 this, just on a general thing. It has to be specific. Some  
20 things may be privileged, and some things not.

21 I'm trying to figure out -- if there are millions of  
22 things, I'm just saying let's just take it in pieces.

23 **MR. KO:** Sure.

24 **THE COURT:** So start with what you want, most  
25 important, what you think is the most yield, or what you think

1 would be the best exemplar for me to rule on. What area.

2 Like --

3 **MR. KO:** Yeah, and here's an example of --

4 **THE COURT:** Not waiving your right to get everything  
5 else.

6 **MR. KO:** Sure. And I understand that, Your Honor.

7 And here is an example for why this issue is, to a certain  
8 extent, ripe. You know, in addition to the policy specialists  
9 that Mr. Loeser alluded to, the app -- the ADI very clearly  
10 involved external investigators. So there are documents that,  
11 by their own very nature, they've presumably waived the  
12 privilege.

13 So communications --

14 **THE COURT:** Well, that's -- I don't accept that  
15 statement, at all. That is way too simplistic.

16 **MR. SNYDER:** Our law firm --

17 **THE COURT:** Uh-uh, I don't need to do that. That is  
18 not a correct statement of the law, Mr. Ko, that just because  
19 an external -- if the external investigator was hired by  
20 Gibson & Dunn, it may very well be privileged.

21 So anyway --

22 **MR. KO:** That's fair, you are absolutely correct.  
23 All I'm saying is, in response to that statement, they're  
24 identifying a categorical privilege and assertion over all  
25 these documents, excluding this narrow category of documents

1 that they claim they're going to produce regarding  
2 communications with third-party app developers. So it kind of  
3 runs both ways is all I'm saying, Your Honor.

4 **MS. WEAVER:** Your Honor, if I may, I think we heard  
5 an offer from Mr. Snyder that we had not previously heard.  
6 And we actually started this discussion months ago by asking  
7 about the escalation process. So, if we got a deadline for  
8 Facebook to send to us the documents sufficient to describe  
9 the escalation process, we might be able to identify  
10 categories.

11 We're a little constrained, because we don't know, really,  
12 what to ask for. We would only be working off experience in  
13 other cases about how investigations were run, and we know that  
14 Facebook is really specialized. So we don't have a lot of  
15 insight, really, into how it was run. Certainly prior to, you  
16 know, 2018. We know about their communications with third  
17 parties because we've seen them, both in the public domain and  
18 documents that we've received here.

19 But I think getting a description from Facebook about:  
20 These are the teams, this is who did what, something like that  
21 by a certain date within a reasonable amount of time, then we  
22 can dig in and make a proposal about: These are the test  
23 categories we want. If that's the direction Your Honor wants  
24 to go in.

25 **MR. SNYDER:** Your Honor, that is all privileged,

1 which is why I say, without waiving privilege, I was simply  
2 saying that we can't -- we had engineers, we had outside  
3 consultants, we had lawyers, we had policy people all working  
4 together to investigate every app on the platform prior to  
5 2015.

6 And you know, if we meet and confer and they asked us  
7 about those consultants, I would say Gibson Dunn hired them.  
8 And they all were Covelled (phonetic), and they're all working  
9 within -- at the direction of counsel. But --

10 **MS. WEAVER:** Well, if I may, this is where we begin  
11 to get confused. Because if they are categorically saying  
12 everything is privileged, then maybe we should brief that.  
13 That can't be right.

14 So I don't know what we have to do to --

15 **THE COURT:** I agree.

16 **MS. WEAVER:** Yeah.

17 **THE COURT:** I doubt that that's correct. But a lot  
18 of it may be, and a lot of it may not. So to brief it gets us  
19 nowhere, unless we do it in context. That's all.

20 **MS. WEAVER:** So how can we develop an understanding?  
21 As plaintiffs, to understand how these things are reviewed,  
22 I'm a bit stymied.

23 **THE COURT:** Well, I think we start with something.  
24 Like, we start with something.

25 **MR. SNYDER:** I think the judge had a great idea.

1           **THE COURT:** Focus on something. They produce a log,  
2 and then, and then we -- we -- we -- I rule on that. Right?  
3 So we start with --

4           **MS. WEAVER:** But I'm concerned, Your Honor, that  
5 they'll cherry-pick only privileges communications between  
6 lawyers and --

7           **MR. SNYDER:** No. No, we have an obligation --

8           **MS. WEAVER:** -- get to the heart of the issue --

9           **MR. SNYDER:** We have an ob- --

10          (Reporter interruption)

11          **MR. SNYDER:** Your Honor --

12          **MS. WEAVER:** My apologies.

13          **THE COURT:** So this is what you do. You start  
14 with -- ask for communications among policy people, that no  
15 lawyers were on. Just start with that. You ask for that.  
16 Right?

17          **MR. SNYDER:** Or another --

18          **THE COURT:** Or ask for communications among the  
19 external investigators, which no lawyers were on.

20          In other words, that's, right, going to be your Backs  
21 (phonetic) case. So start by asking for those.

22          **MR. SNYDER:** I thought, Judge, you had an excellent  
23 idea. Let's say there's App X that we had correspondence  
24 with, and it's in those 16,000 pages. And we have back and  
25 forth with an app about some platform violation.

1       They can then ask us with respect to that particular app  
2     and -- and engagement with that app, what is behind the  
3     curtain? You know, who else communicated at Facebook before  
4     you sent that? And we can look at those documents, and  
5     determine what's privileged and what's not.

6       And if we make a categorical privilege claim with respect  
7     to everything so-called "behind the curtain," that could be  
8     teed up for Your Honor because that would be illustrative of an  
9     approach to a particular app enforcement that grows out of the  
10    legal investigation.

11           **MR. LOESER:** And Your Honor, I think, again, for this  
12    to work -- and this is Derek Loeser speaking -- we will come  
13    up with a couple categories that we will choose.

14       They may not be the categories that Mr. Snyder would like  
15    us to choose, but they will be the categories that we think  
16    will show as best we can, when we don't have the information  
17    when we are making the choices, why there is a problem with the  
18    approach that they're taking.

19           **MR. SNYDER:** And I just want to warn everyone or  
20    caution everyone, this was a massive investigation because the  
21    CEO committed to Congress and the public that he was going to  
22    direct this investigation.

23       So if you ask, just as a caution -- narrate, no -- for  
24    every communication between consultants and among consultants,  
25    that will be probably tens of millions of communications.

1 Because every time we told a consultant to do something with  
2 respect to an app, and it was always a legal direction, the --  
3 the consultants didn't direct the investigation, I imagine that  
4 the consultants then went off into consultant-land and  
5 exchanged 10 million emails before they came back with the work  
6 product, brought it to counsel, and then a decision was made.

7 So the volume here is -- we should look at the volume. My  
8 guess is we're talking about many tens of millions of  
9 documents.

10 **MR. LOESER:** Well, Your Honor, we haven't received  
11 many millions of anything. But I think a lot of what  
12 Mr. Snyder just said sort of highlights the problems and the  
13 reasons why I think this will result in briefing.

14 For one, maybe we'll start as a category the  
15 communications between the CEO and the data policy people. And  
16 this is -- I mean, everything you'll read about this from their  
17 public statements, this is a very public activity that Facebook  
18 has done. And it's very important, clearly, to get this  
19 information about this investigation to its users. That's why  
20 they keep posting about it.

21 We can come up with some categories that we think will  
22 make clear to the Court what the problem is and where the  
23 limits of privilege are.

24 As you've, I think, rightly noted, we do not want access  
25 to and understand that we don't get access to privileged

1 communications. But there's a lot here that's not privileged.  
2 And we know that because of the public things that Facebook has  
3 said, including what the CEO has said.

4 And we'll figure out some categories that try and bring  
5 this into focus for the Court.

6 **THE COURT:** I think that's the way to do it. And I  
7 guess on Wednesday, you did get some -- about 10,000 pages,  
8 and you can look at that and see if that helps.

9 But I do want to -- I don't think necessarily we should  
10 wait to adjudicate it, but I do want to adjudicate it in a  
11 context. And it'll be just one small piece, and that then  
12 will, I think -- I've found, at least, that'll help with the  
13 other, the other side. Okay, so that will be on your agenda to  
14 discuss.

15 Okay. I do have a settlement at 9:30 so we have to -- I'm  
16 going to be late for.

17 Let's see. Oh, the search terms. So the stipulation that  
18 the parties signed said that Facebook was going to provide  
19 search terms for a broad spectrum of custodians.

20 So tell me how Facebook has come up with that broad  
21 spectrum of custodians that they will provide on July 21st.

22 **MS. KUTSCHER CLARK:** Sure, Your Honor. And, I think  
23 the issue that was raised in the statement was a bit of a  
24 misunderstanding. So I think we can resolve that easily.

25 The search term protocol provides a deadline to propose



1 search terms for each custodian. We divided the custodians  
2 into eight groups. And what we said is we would propose a  
3 comprehensive set of search terms by the 21st. But the  
4 deadline to propose search terms for the first four groups is  
5 also the 21st, with future deadlines for other groups.

6 The way we understood that is we'll be providing a  
7 comprehensive set of search terms that will apply broadly next  
8 week, but we're not proposing any terms that are specific to  
9 custodians we have not yet interviewed, until the deadlines for  
10 those custodians.

11 So the idea is there will be a comprehensive set of terms  
12 for the first four groups that will include terms that are  
13 specific to the custodians within those groups. So we talk to  
14 those people, we learn jargon, we learned code names. We'll  
15 include that sort of information. To the extent groups of  
16 custodians were not interviewed, we're not going to have  
17 specific terms for those people yet because we're still talking  
18 to them.

19 **THE COURT:** But they will be included in the broader  
20 search terms.

21 **MS. KUTSCHER CLARK:** I'm sorry; I just didn't  
22 understand some of --

23 **THE COURT:** Sorry. But what you're saying is --  
24 but -- but is the broader search terms will apply to them.  
25 You just won't have the specific search terms.

1           **MS. KUTSCHER CLARK:** Yes, exactly.

2           And the one thing I do want to clarify, just to make sure  
3 we're all on the same page, is there is one RFP, a single RFP  
4 that is not covered by the first four groups of custodians.

5           So because we will not yet have spoken to any of the  
6 custodians about the issues with that RFP, we did not intend to  
7 propose a comprehensive set of search terms for that one  
8 specific RFP. But otherwise, they will all be covered, in  
9 addition to the specific terms for the first four groups.

10          **MS. WEAVER:** Which RFP is that?

11          **MS. KUTSCHER CLARK:** Don't hold me to this; off the  
12 top of my head, I think it's 22. But I would need to look  
13 again at my notes.

14          **MS. WEAVER:** Okay. This is the first we're learning  
15 of it. But we're fine with that, Your Honor. The statement  
16 did read as though they were limiting it to 41. We  
17 understand, and I think you will understand the point.

18          **MS. KUTSCHER CLARK:** Yeah. I think it was just a  
19 misunderstanding. We're happy to talk more about it.

20          **THE COURT:** Okay, great. What else should we talk  
21 about?

22          **MS. WEAVER:** Your Honor, very briefly, just  
23 43(b)(2)(C), I think you've seen kind of an example of the  
24 crossing of ships in the night.

25          For example, you know, with regard to ADI, it has been

1 very hard for us to get our arms around what Facebook is  
2 withholding. And we, for example, have told Facebook that we  
3 will tell them if we are withholding anything, any categories  
4 of documents that are responsive. And things got a little  
5 flipped around.

6 I think we originally framed it as: Let us know if you  
7 categorically object to any RFP. And they -- initially they  
8 said yes, then they said -- the final response was only 19,  
9 which is ADI.

10 But then when we dug in, and we started meeting and  
11 conferring, it became unclear to us whether Facebook is taking  
12 a position with regard to certain categories of documents that  
13 are responsive. Meaning we're not objecting categorically to  
14 an RFP, but are they withholding some small subset that is  
15 responsive that they haven't identified to us because they're  
16 saying no, that's not relevant? And the whole point of  
17 34(b)(2)(C) is to make that transparent, so the parties can  
18 engage.

19 And, and this is what we understand now, Facebook is  
20 saying: Well, for search term documents, we're not ready yet.  
21 And we understand that, and we will wait.

22 But we want to know now for categories of RFPs where  
23 search terms are not required, has Facebook decided that there  
24 are responsive materials which are not relevant? And we heard  
25 some of it today. Some of it came out in their statement. But

1 that's the conversation that we want to have. And we think  
2 we're entitled to that.

3 **MR. SNYDER:** Your Honor, just briefly, they raised  
4 the same issue with Judge Chhabria with regard to our FTC  
5 production. And Judge Chhabria ruled, clearly consistent with  
6 the federal rules, that defendants, like all parties, are  
7 presumed to conduct their relevance review in good faith and  
8 are not required to make such disclosures which are not  
9 required. That is to say, there's no requirement that we  
10 identify irrelevant documents in advance.

11 We are going to. We've produced 1,200,000 pages of  
12 documents, including, I think, 40- or 60,000 that are internal  
13 Facebook documents, already. We will continue to produce  
14 responsive relevant documents. The rules require that. We've  
15 done it. And we don't have an obligation to say what is  
16 irrelevant and not being produced. That's just backwards.  
17 It's been rejected by Judge Chhabria. And really, we think,  
18 you know, it makes no sense whatsoever.

19 **MS. WEAVER:** Well, we don't see -- go ahead.

20 **THE COURT:** I guess what -- for example, something  
21 that's been produced are documents that were produced to the  
22 FTC. Right?

23 And so --

24 **MR. SNYDER:** Yes.

25 **THE COURT:** -- one question is: Did you withhold

1 anything that's not relevant?

2 **MR. SNYDER:** That was asked of us. And Judge  
3 Chhabria said we did not have to -- I don't know the answer to  
4 that, but --

5 **MS. KUTSCHER CLARK:** No, we didn't. He didn't  
6 withhold anything on relevance grounds, no.

7 **MR. SNYDER:** We did not.

8 **THE COURT:** Okay. You did not. Okay. All right.

9 So, Ms. Weaver, what is -- what is the -- the search  
10 terms, I get, were not -- they can't know until they've  
11 searched.

12 So what is -- with respect to what's been done so far,  
13 what is the concern?

14 **MS. WEAVER:** Other regulatory documents, so they  
15 produced to the ICO and DCMS in the UK. Those are regulatory  
16 bodies. Did they categorically decide that there were  
17 portions of those inquiry not relevant to our case?

18 For example, this has arisen -- this is in a slightly  
19 different context -- with regard to PwC documents. They have  
20 said PwC was looking at things not relevant to the case. But  
21 we don't know what those are, even generally, by topic. And if  
22 they told us, we might agree. But they're just making the  
23 decision, without sharing it with us.

24 They have said at different points: We're only producing  
25 certain kinds of materials relating to advertising. We don't

1 know where they're drawing that line. This has arisen in the  
2 context of the financial documents, the RFPs that seek  
3 information about their finances. So, how are they drawing the  
4 line between what they think is relevant, and what they  
5 think isn't?

6 These are all things where we need them to take a  
7 position, and frankly, some of these things, it would be  
8 helpful if they did it in writing. Because when we have these  
9 conversations, it's circular for us. And we -- there's  
10 misunderstanding. And if they put it on paper, we can see it,  
11 and it's helpful.

12 **MS. STEIN:** Your Honor, we have not taken a  
13 categorical position on anything that we're withholding.  
14 We're doing this, as plaintiffs do in every case. Which is we  
15 meet and confer -- I mean, we've had a gazillion  
16 meet-and-confers on plaintiffs' RFPs, to use a technical  
17 estimation of the time. And then, our reviewing and producing  
18 documents for relevance the way -- and responsiveness the way  
19 parties do in every case.

20 There's no category of documents that we're sort of  
21 secretly setting aside. Documents are either responsive and  
22 relevant, or they're not. Most of this it's very hard to argue  
23 about in a vacuum, which is what we've repeatedly said to  
24 plaintiffs. But these are why the -- the search term ones, as  
25 Ms. Weaver has noted, you know, it's fighting about it in a

1 vacuum about what the scope is going to be.

2 **THE COURT:** We're not --

3 **MS. STEIN:** Right. For the specific RFPs, we've had  
4 very detailed conversations about what's getting produced.  
5 There's been no categorical objection to some sort of -- I  
6 mean, this use of the term "categorical," there's no bucket of  
7 documents that we're setting aside as irrelevant. We look at  
8 documents on a document-by-document basis, as they populate.  
9 And, you know, a reviewer will look at them for whether  
10 they're responsive or not. But, I mean, it's no different  
11 than any other case.

12 And it's just really been very challenging for us because  
13 we keep getting asked about categorical, you know, objections.  
14 We don't have a categorical, you know, bucket that we're  
15 refusing to produce.

16 **MR. LOESER:** Your Honor, if I can --

17 **THE COURT:** For the PwC documents, were there  
18 documents that were withheld as non-responsive -- as -- yeah,  
19 as not relevant?

20 **MS. KUTSCHER CLARK:** Your Honor, that's a difficult  
21 question to answer because plaintiffs' (audio interference)  
22 the PwC documents, it's a much more complicated request, where  
23 they asked for the documents referenced in particular PwC  
24 reports. Ands the issue there is more about the fact that  
25 it's very difficult for us to identify what PwC, as a third

1 party, relied on. So there have not been relevance objections  
2 to those documents. Some of them haven't been produced  
3 because we're having difficulties identifying them.

4 But for all other materials, what we have consistently  
5 told plaintiffs is we are determining relevance based on the  
6 four theories of liability that Judge Chhabria laid out in his  
7 motion-to-dismiss order. Judge Chhabria said these are the  
8 four theories that are in play in the case. And we are making  
9 every relevance determination, based on those four theories.  
10 And that's what we have consistently told the plaintiffs.

11 **THE COURT:** But, so, but I do think, I do think that  
12 you do have an obligation to, as part of the meet-and-confer,  
13 explain -- give examples. For example: This is a document  
14 that is responsive to your requests but that we decided was  
15 irrelevant. Just explain that.

16 **MR. KO:** Your Honor, this is David Ko again. And  
17 just -- I completely agree, that's what we've been asking and  
18 in the context of this specific example of PwC that we're  
19 discussing is exactly where it's come up.

20 I'm a bit surprised that Ms. Kutcher Clark is saying that  
21 they are not withholding on relevance grounds due to some  
22 technical misunderstanding of our requests. They have made it  
23 clear in their meet-and-confers to us that they believe that  
24 both the Facebook privacy program and PwC (inaudible) contains  
25 large amounts of information they believe are not relevant to



1 this case.

2 And so we asked them to identify what those are, because  
3 our view of those reports by PwC and the underlying Facebook  
4 privacy program is that we believe most of it is relevant. And  
5 we have provided them with examples why. They have refused to  
6 give us examples in response for what is not relevant.

7 So you --

8 **MS. KUTSCHER CLARK:** May I respond to those?

9 (Reporter interruption)

10 **MR. SNYDER:** Sorry, my phone keeps on falling down.  
11 That's what's happening. I'm muting it; I apologize.

12 **MS. KUTSCHER CLARK:** The issue with the PwC  
13 documents, Mr. Ko is correct in that we don't believe  
14 everything PwC looked into over a ten-year period is  
15 necessarily relevant to this case. However, we haven't  
16 provided had a detailed analysis of that, because those  
17 materials haven't actually been requested. And we've talked  
18 about those, ad nauseam.

19 The plaintiffs did not serve a document request for all of  
20 the documents between Facebook and PwC. They served a very  
21 different request. So we have been talking about that request.  
22 And at this point it would be premature to do the type of work  
23 Mr. Ko is describing, because we don't have it a request for  
24 that information.

25 **THE COURT:** Okay. All right. So the only guidance

1 I'm going to give here is that if -- if responsive documents  
2 are being withheld on the ground that you decided they're not  
3 relevant, I do think, and I -- I -- that you should -- as part  
4 of the meet-and-confer, you explain why, and you give an  
5 example. That that's part of the meet-and-confer process.  
6 If -- if it's being withheld on relevance grounds. If it's  
7 not, then there's not. But if it is, then you should sort of  
8 give the other side an explanation as to how you're drawing  
9 that line.

10 **MR. LOESER:** Your Honor, this is Derek Loeser. That  
11 would be very helpful.

12 **MR. SNYDER:** Judge, I'm having -- I know Your Honor's  
13 late.

14 Are you suggesting that every time a reviewer -- I'm not  
15 being facetious. Every time a reviewer takes a document and  
16 asks whether it's relevant, we have to make a notation so that  
17 we can explain?

18 **THE COURT:** No, of course I'm not suggesting that at  
19 all, Mr. Snyder, and I don't. What I said is as part of the  
20 meet-and-confer process, generally when you've made decisions  
21 as to what's relevant, what -- they say somewhat  
22 categorically, but sort of give -- just give an explanation:  
23 This is the direction that we gave our reviewers. Right?  
24 This is where we draw, where we drew the line.

25 That's what I'm saying. Like, generally --

1           **MR. SNYDER:** Understood.

2           **THE COURT:** -- drew the line. And they can say:

3           Okay, I understand that, I agree. We don't want those  
4           documents. We already have a lot of documents --

5           **MR. SNYDER:** We've done that; we've done that  
6           already, and I've even done that on earlier meet-and-confers.  
7           We will do it again, and we will do it with force and clarity  
8           again. But we will make that clear.

9           Thank you.

10          **THE COURT:** Okay.

11          **MR. LOESER:** Your Honor, I do think that would be  
12          helpful. An example would be the conversation we had about  
13          ADI. Clearly, they made the decision that all information  
14          that was internal would be withheld. But when you look at  
15          their offer for what they're producing, they talk about all  
16          these communications with third parties, but they're not --  
17          they haven't 'fessed up to what they actually were doing, was  
18          eliminating from what they intended to produce everything that  
19          was internal to Facebook.

20          So that kind of conversation would allow the parties to  
21          quickly realize where the disconnects are.

22          **MS. STEIN:** ADI is completely --

23          **THE COURT:** As I understand the ADI, they believe,  
24          their position is that everything that was done as part of  
25          their -- the investigation, and whether they were outside

1 investigators or internal Facebook people, is privileged.  
2 What they've agreed to produce are the communications like  
3 with the app developers, because clearly they're not part of  
4 Facebook. They weren't hired at the direction of the  
5 attorneys.

6 **MR. LOESER:** Right.

7 **THE COURT:** But I understand it's a broad privilege.  
8 So -- okay.

9 When shall we have -- is it two weeks?

10 **MS. WEAVER:** Yes, Your Honor, that would be fine.

11 **THE CLERK:** (Inaudible)

12 **MS. WEAVER:** That's Friday the 31st?

13 **THE COURT:** Go back to Friday.

14 **MS. WEAVER:** I'm sorry; this is Monday, isn't it? My  
15 fault.

16 **THE COURT:** We were meeting on Fridays, so that's  
17 fine.

18 Ms. Means, how does Friday the 31st look?

19 **THE CLERK:** Oh, the 31st is fine. Do you want 9:00  
20 or 8:30?

21 **THE COURT:** Can we do 8:30 again?

22 **THE CLERK:** Yes.

23 **THE COURT:** Okay. All right. We'll have the  
24 statement due whatever the schedule is that I set. That seems  
25 to be working well.

1           **MS. STEIN:** Your Honor, on the schedule, if -- if we  
2       could build in a little bit more time between when can we  
3       get -- sort of do the initial exchange, and then when we do  
4       the final exchange, I think that would be helpful.

5           It's just -- the schedule has proven a little bit tight as  
6       we have to sort of work through issues, often with our client,  
7       and get approvals. It would -- right now, we typically have a  
8       24-hour turnaround.

9           **THE COURT:** So what would you propose?

10          **MS. STEIN:** I think 48 hours would be better, or at  
11       least 36 hours.

12          **THE COURT:** Ms. Weaver, can you work something out  
13       with them?

14          **MS. WEAVER:** Yes, of course. That's no problem.

15          **THE COURT:** Okay. Whatever you guys work out is fine  
16       with me.

17          **MS. STEIN:** Thank you.

18          **MS. KUTSCHER CLARK:** Your Honor, one more timing  
19       request.

20               We're starting to find that during our meet-and-confers,  
21       we're sort of returning a little bit to the game of  
22       whack-a-mole we were all playing before we started meeting with  
23       you. And we're finding that we're having a little bit of  
24       difficulty focusing and making progress, due to the sheer  
25       number of issues that are on meet-and-confer agendas, and being

1 discussed.

2 And we're just hoping that perhaps we could have a little  
3 bit of guidance limiting the number of issues, or at least  
4 focusing the number of issues, so that we can make sure we are  
5 moving forward with those things, and not spinning our wheels  
6 on 15 things instead of making progress on five.

7 **MS. WEAVER:** May I respond to that, Your Honor?

8 **THE COURT:** Yes.

9 **MS. WEAVER:** We believe that it has been very narrow.  
10 We haven't raised any pressures of issues that we haven't  
11 previously -- like ADI, there are a number of issues that we  
12 have, in fact, been sitting on.

13 We understand -- we worked would with them to give them  
14 six weeks to do this first set of search terms. But certainly,  
15 there are all kinds of issues -- deposition protocols, all  
16 kinds of things -- that we have been waiting on. So I'm really  
17 kind of baffled by that. And I don't know what issues we have  
18 been raising.

19 I do think it's true that Facebook asks us to send them a  
20 detailed email before each meet-and-confer on the topics we  
21 wish to discuss, which we have been doing.

22 So this is a little bit out of left field to me, but we  
23 are really trying to work with the system here.

24 **THE COURT:** Okay. I don't know what I can do, sort  
25 of out of context.

1           **MS. STEIN:** Yeah, I don't think -- I don't think  
2           Ms. Kutscher Clark meant it in any way to suggest that there  
3           was a lack of cooperation on either side. I think we're just  
4           all dealing with a lot of issues, and thought we were making  
5           more progress when it was sort of tailored in advance as to  
6           what we should specifically be discussing.

7           **MS. KUTSCHER CLARK:** Exactly.

8           **THE COURT:** I see. I think what you have to discuss  
9           is the ADI. Right? You're going to get the search terms on  
10          July 21st.

11          **MS. KUTSCHER CLARK:** (Nods head)

12          **THE COURT:** You have the plaintiffs' production,  
13          because now you have to discuss how you're going to get that  
14          information. And you have the defendant's ongoing production.

15          **MS. WEAVER:** And the 34(b)(2)(C) issues, if they are  
16          withholding.

17          **THE COURT:** Well, yeah. That's related to their  
18          production and if they're withholding anything. So I think  
19          those are the topics. It's a lot.

20          Sounds like things are moving forward.

21          **MS. WEAVER:** We are, in fact, meeting and conferring  
22          slightly less than we were doing it three times a week which,  
23          although that was productive, that was a little intense.

24          **THE COURT:** That was intense.

25          **MR. LOESER:** Well, and Your Honor, at the beginning

1 of every meet-and-confer we have ten minutes of generally  
2 getting along really well.

3 **MS. WEAVER:** That's true.

4 **THE COURT:** You're all getting along just fine. You  
5 know, these are very trying times.

6 **MS. STEIN:** We've all learned a lot about each other.

7 **THE COURT:** Yeah. Yeah.

8 **MR. SNYDER:** Judge, that's because I stopped  
9 attending them.

10 **MR. LOESER:** That was a huge advantage for all of us,  
11 that's true.

12 (Laughter)

13 **MR. KO:** At least now you freely admit it, Orin.

14 **THE COURT:** All right. I will see you, then, on the  
15 31st at 8:30 a.m.

16 **MR. LOESER:** Thank Your Honor.

17 **MR. SNYDER:** Thank Your Honor.

18 **THE CLERK:** Court is adjourned. Thank you, everyone.

19 (Proceedings concluded)  
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**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Tuesday, July 14, 2020